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STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
Southwest Regional Office

PO Box 47775 • Olympia, Washington 98504-7775 • (360) 407-6300

May 19, 2022

Ankur K. Tohan, Partner
K&L Gates
925 4th Ave, Suite 2900
Seattle, WA 98104
Ankur.tohan@klgates.com

Re: Final Determination of Liability for Release of Hazardous Substances at the following Contaminated Site:

- **Site Name:** Terminals 5 6 & 7 Uplands
- **Site Address:** Marine Drive, Port Angeles, Clallam County, WA 98363
- **Facility/Site ID:** 97700
- **Cleanup Site ID:** 15440
- **County Assessor's Parcel Number(s):** 063000190090, 063099190025, 063099190035, 063000505520

Dear Ankur Tohan:

On July 15, 2021, the Department of Ecology (Ecology) sent you written notice of our preliminary determination that Owens Corning is a potentially liable person (PLP) for a release of hazardous substances at the Terminals 5 6 & 7 Uplands facility (Site).

You responded on behalf of Owens Corning in a letter dated August 19, 2021. In that letter you stated that Ecology's "[Model Toxics Control Act] MTCA claim" against Owens Corning for the Site was discharged in Owens Corning's 2006 chapter 11 bankruptcy proceedings, and that Owens Corning reserves the right to seek a determination from the United States Bankruptcy Court for the District of Delaware that Ecology's MTCA claim was discharged and a court order holding Ecology in contempt for any actions it takes to impose MTCA liability claims against Owens Corning at the Site.

As noted in your August 19, 2021, letter, Ecology's preliminary determination was based on, among other things, the analysis set forth in Ecology's letter of November 14, 2013, setting forth Ecology's determination of Owen Corning's potential liability for the adjacent Western Port Angeles Harbor Site (WPAH Site).

Regarding your citation of the 2nd Circuit decision *In re Chateaugay*, 944 F.2d 997, 1008 (2nd Cir. 1991) for the proposition that Ecology's determination of Owens Corning's potential liability for cleanup at the Site constitutes a "claim" under the Bankruptcy Code and [Owens Corning] OC reorganization plan, Ecology asserts that a person's obligation to remediate releases of hazardous substances for which that person meets the definition of a potentially liable party under MTCA, is not a "claim" that is dischargeable in bankruptcy. *See, e.g., In re Torwico Electronics, Inc.*, 8 F.3d 146, 151 (3rd Cir. 1993) (holding that former operator of manufacturing plant that no longer had possession of the property where hazardous substances were released to the environment had a continuing obligation to take action, in response to a state agency order, to ameliorate the ongoing hazard from the release of hazardous substances, and that whether "authority may exist under other potentially relevant statutes for the state to perform the cleanup and seek reimbursement for its costs is irrelevant").

Your letter also states that Ecology's "MTCA claim" arose prior to confirmation of the OC reorganization plan and was discharged because Ecology's claim is based on Fibreboard's prepetition conduct. You state that Ecology had knowledge of the contamination at the Site prior to the claims bar date on April 15, 2002, including the investigations at the Site dating back to 1988.

Again, Ecology's determination of Owen's Corning's potentially liability for cleanup at the Site is not a claim under the reasoning in *In re Towrico Electronics*. But even if it were a claim, it did not arise or accrue until after Fibreboard's and Owens Corning's 2006 emergence from bankruptcy and therefore was not discharged. This is the case under both the "fairly contemplated" standard of *In re Jensen*, 995 F.2d 925 (9th Cir. 1993) or the "accrual test" of *Avellino v. M. Frenville Co.*, 744 F.2d 332 (3^d Cir. 1984). *Wright v. Owens Corning*, 679 F.3d 101,109 (3rd Cir. 2012) (holding that *Frenville's* "accrual test" applies to the Owens Corning et al. Bankruptcy and to all bankruptcy cases in which reorganization plans were confirmed prior to June 2, 2010).

Although Fibreboard's mill operations in Port Angeles ceased in 1970, Ecology did not have credible evidence that the ongoing release of hazardous substances associated with Fibreboard Corporation's past operations resulted in exceedances of applicable MTCA cleanup levels in the sediments of western Port Angeles Harbor until well after Ecology's sediments investigation, which began in 2008.

Beginning in 2008, Ecology conducted an investigation of hazardous substances in marine sediments in Port Angeles Harbor. As a result of its investigation, Ecology found a distinct source area of sediment contamination in Port Angeles Harbor, located within the western part of the Harbor. Further, Ecology found that upland sources of contaminants, including metals and dioxins, along the western harbor shoreline, including at the location of the former

Fibreboard sulfite pulp mill facility, appeared to be a supplier of these contaminants to the western harbor.

Ecology's findings are detailed in reports titled *Port Angeles Harbor Sediment Characterization Study, Sediment Investigation Report*, February 2012; and *Port Angeles Harbor Supplemental Data Evaluation to the Sediment Investigation Report, Summary Report*, February 2012.

The remedial investigation that was required by Agreed Order No. DE 9781 (May 2013) for the WPAH Site included "identification of ongoing upland sources of contamination that have the potential to result in sediment recontamination at levels greater than the prospective sediment cleanup standards." The October 2020 Remedial Investigation/Feasibility Study final report submitted on behalf of the Western Port Angeles Harbor Group did identify such potential source areas, including along the shoreline at the Site (Sec. 4.3.4., Appendix E, Figures E.1, E.4).

Ecology's determination of Owens Corning's status as a potentially liable person is based on those remedial investigation findings, which point to the continuing release of hazardous substances, some of which were likely initially released while Owens Corning's predecessor, Fibreboard, was an owner or operator at the Site. In addition, although soil sampling in 1988-89 at the former Fiberboard location showed the presence of dioxins/furans (a contaminant associated with hog fuel boilers such as operated by Fiberboard) and mercury, no remedial action was deemed necessary under the standards applicable at that time.

Based on improvements in scientific understanding in intervening years, Ecology has lowered the concentrations at which cleanup of these contaminants is required under MTCA. Ecology's basis for requiring remedial action by Fibreboard or its successor did not accrue, nor could the obligation have been fairly contemplated, until after the claims bar date in the Owens Corning et al. bankruptcy and after confirmation of the plan of reorganization.

Ecology acknowledges the information provided in your August 19, 2021, letter regarding Daishowa's ownership, leasing, and operations at the Site from approximately 1988 to 2002, but has not reached any determination in regard to Daishowa or its successor's potential liability.

Based on available information, Ecology finds that credible evidence exists that Owens Corning is liable for a release of hazardous substances at the Site. On the basis of this finding, Ecology has determined that Owens Corning is a PLP with regard to the Site.

Ecology appreciates Owens Corning's assurance that, notwithstanding the legal assertions in your August 19, 2021, letter, Owens Corning may voluntarily cooperate with other PLPs at the Site on next steps in the cleanup process. Ecology also appreciates that Owens Corning has worked cooperatively with PLPs at the adjacent WPAH Site in implementing Agreed Order No. DE 9781 with Ecology.

The purpose of MTCA is to identify, investigate, and cleanup facilities where hazardous substances have been released. Liability for environmental contamination under MTCA is strict, joint and several (Revised Code of Washington [RCW] 70A.305.040(2)). Ecology ensures that contaminated sites are investigated and cleaned up to the standards set forth in the MTCA statute and regulations. Ecology has determined that it is in the public interest for remedial actions to take place at this Site.

Ecology plans to work with the Port of Port Angeles to bring about the prompt and thorough cleanup of hazardous substances at this Site. Should you wish to be involved in the cleanup, or should Ecology determine that it is necessary for you to take actions to facilitate the cleanup, please be aware that failure to cooperate with Ecology or comply with MTCA in this matter could result in Ecology employing enforcement tools as it deems necessary and appropriate. This includes, but is not limited to, the issuance of an administrative order. Failure to comply with such an order may result in a fine of up to \$25,000 per day and liability for up to three times the costs incurred by the state (RCW 70A.305.050(1)).

Your rights and responsibilities as a PLP are outlined in chapter 70A.305D RCW, and chapters 173-340 and 173-204 Washington Administrative Code (WAC).

If you have any questions regarding this notice, please contact Connie Groven at (360) 407-6254 or connie.groven@ecy.wa.gov.

Sincerely,



Rebecca S. Lawson, P.E., LHG
Section Manager
Toxics Cleanup Program
Southwest Region Office

By certified mail: 9489 0090 0027 6066 5419 96

cc by email: Allison Geiselbrecht, Floyd|Snider, Allison.Geiselbrecht@floydsnider.com
Karen F. Goschen, Port of Port Angeles, kareng@portofpa.com
Nicole Kimzey, Merrill & Ring, nkimzey@merrillring.com
Paul S. Lewandowski, Owens Corning, Paul.S.Lewandowski@owenscorning.com
Jesse Waknitz, Port of Port Angeles, jessew@portofpa.com
Jon Thompson, Office of the Attorney General, jonathan.thompson@atg.wa.gov
Connie Groven, Ecology, connie.groven@ecy.wa.gov
Ecology Site File